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September 6, 2016

Via Certified Mail and E-Mail

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Re: P/N SAC-2008-01333 REVISED – Interstate 73

Dear Sirs:

The Southern Environmental Law Center submits these comments on behalf of the Coastal Conservation League, in response to the U.S. Army Corps of Engineers' and South Carolina Department of Health and Environmental Control's (DHEC) joint public notice (JPN) dated July 8, 2016 regarding permits and authorizations for a revised version of Interstate 73. As explained in greater detail below, we believe that applicant South Carolina Department of Transportation (SCDOT) should withdraw its request for these permits until it reevaluates and supplements the Final Environmental Impact Statements under the National Environmental Policy Act (NEPA) for both the Southern and Northern Corridors of the proposed project.[1] As it stands now, the Corps and DHEC must deny the permits either because the applicant has not provided sufficient information in either Final Environmental Impact Statement (FEIS) to support issuing the permits or, if the Corps and DHEC engage in their own analysis, because less damaging practicable alternatives exist to the project as proposed. Thus, we recommend that the agencies urge the applicant to withdraw its application until further analysis of the project and its alternatives is completed in Supplemental Environmental Impact Statements.

The FEIS for the non-revised version of the Southern Corridor of I-73 was completed in late 2007, and the Record of Decision for the Southern Corridor selecting the original project

[1] The applicant has applied for permits for both portions of I-73. In this letter, we focus our comments primarily on the Southern Corridor, yet our comments apply equally to the Northern Corridor as well.

design was issued in early 2008.[2] In 2010, the applicant reevaluated the FEIS for the Southern Corridor in light of changes to the selected project design, but found that there was no need to supplement the FEIS. In 2011, the applicant first applied for Corps and DHEC approvals but never received them. Throughout this process, we have submitted numerous comment letters explaining why the FEIS is not sufficient to comply with applicable law and the selected project designs are not in the public interest.[3] One of the main flaws is that the FEIS narrowly construes the purpose of the project to exclude viable alternatives that would have less impact on the environment and lower cost. Since issuance of the FEIS, the project and circumstances have changed dramatically, but the applicant has neither reevaluated nor supplemented the FEIS, as federal law requires. As a result, the FEIS is nearly a decade old, does not assess the project as currently proposed, and fails to adequately consider alternatives.

Without an accurate assessment of the current project that reflects both its true financial and environmental costs and its practicable alternatives, the Corps cannot move forward with its own required analyses under Section 404 of the Clean Water Act (CWA) and the National Environmental Policy Act (NEPA). DHEC faces the same problems. South Carolina regulations also prohibit DHEC from authorizing any project where there are less damaging, feasible alternatives available or where the project will cause permanent damage to aquatic ecosystems. Both the Corps and DHEC have independent obligations to assess the impacts of the proposed project and its alternatives, and both would benefit from waiting until the FEIS is updated to reflect the project as proposed.

Moreover, the Corps and DHEC are not the only agencies poised to consider permits and/or approvals for the proposed I-73, and therefore not the only parties that would benefit from updating the environmental assessment of this project. A number of state and federal agencies will be engaged in various processes related to this project, including but not limited to the S.C. Department of Natural Resources, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the U.S. Environmental Protection Agency. In addition to these agencies, the public will have opportunities, such as this, to weigh in on this proposal. Because it appears that the agencies cannot simply wait until the applicant supplements the FEIS, the Corps and DHEC should encourage the applicant to withdraw the permit request until the applicant completes the required reevaluation and supplementation of the FEIS.

If the Corps and DHEC move forward without supplementation, the agencies must deny the permit request. Trying to evaluate the current project without an accurate FEIS will undermine each of the various permitting and certification processes, and will undercut the public's ability to engage in a meaningful review of the proposal. There is simply not enough information in the public notice and FEIS to fulfill the agencies obligations under NEPA, the CWA, and South Carolina wetland regulations. If the Corps and DHEC move forward and

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[2] The FEIS for the Northern Corridor was issued on August 6, 2008 with a ROD signed on October 22, 2008. Unless otherwise indicated, when we use the term "FEIS" in this letter, we are referring to the FEIS for the Southern Corridor. Despite our focus on the Southern Corridor, our arguments with respect to the Southern Corridor also apply to the Northern Corridor and its FEIS.

[3] We include with this letter our previous comment letters submitted on the I-73 project, along with their attachments, dated March 19, 2004; September 15, 2004; May 5, 2005; August 8, 2005; January 31, 2006; July 28, 2006; March 30, 2007; August 31, 2007; September 17, 2007; January 7, 2008; March 28, 2011; and July 5, 2012.

somehow attempt to update the information contained in the FEIS on their own, their analysis will likely show that less damaging, practicable alternatives to the project as proposed exist, like upgrading portions of S.C. 38 and U.S. 501 to an expressway between I-95 and the Conway Bypass (S.C. 22). Because such alternatives exist, state and federal law will require DHEC and the Corps to deny the requested permits.

With respect to the new mitigation plan, the applicant must first demonstrate that it has sufficiently avoided and minimized impacts to aquatic resources before considering a mitigation plan. Here, SCDOT has failed to demonstrate by clear and convincing evidence that less damaging practicable alternatives to its preferred alternative do not exist. Until SCDOT makes this showing, the proposed mitigation plan is irrelevant. To the extent the Corps and DHEC insist on moving forward with the respective permitting processes now, much more information is needed to evaluate the new mitigation plan. Finally, this letter explains why the Corps (and DHEC) cannot simply disregard all of the previous public comments it has received regarding this project.

Once the FEIS is reevaluated and supplemented, we look forward to working with the Corps and the other various agencies to identify the best result for meeting transportation challenges in the project area that will comply with applicable federal and state standards.

BACKGROUND

SCDOT proposes to construct a new four-lane divided highway to become part of the federal interstate Highway System. The I-73 project includes two portions. The first portion, called the Northern Corridor, would split from I-74 near Hamlet, North Carolina and cut almost directly south through the northeastern portion of South Carolina to cross Interstate 95 near Latta, South Carolina. The second portion, the Southern Corridor, turns southeast to run parallel to Highway SC-38/US-501 until it joins SC 22, the Conway Bypass, and terminates in North Myrtle Beach, South Carolina.

The project was first proposed 2004 but has stalled several times because of its immense cost to the taxpayer and natural resources of the state. SCDOT has estimated that the project would cost $2.37 billion – nearly double the agency's entire yearly budget, yet – to our knowledge – the cost estimate is as old as the FEIS, if not older. As originally proposed, the project would damage over 340 acres of wetlands, over 20,000 linear feet of streams, and destroy 99 homes, business, and churches along the route.

The unbelievable costs of building a new interstate are why most states chose to improve existing roadways in order to accommodate the stated need for I-73. I-73 is part of a Congressional plan to improve roadways from Ohio to the coast of South Carolina. Rather than constructing a new interstate, Michigan, Ohio, and North Carolina have satisfied Congressional intent by using existing roadways.[4] That makes good sense because improving existing

[4] *See, e.g.*, SCDOT and FHWA, I-73 FEIS Re-evaluation at 1 ("At the national level, Michigan has upgraded some existing roads to interstate standards. . . . Ohio has existing roadways that would duplicate the I-73 Corridor; therefore, Ohio has decided not to build a new facility and instead is addressing individual congestion issues along

roadways will typically fulfill the stated need with fewer impacts on the natural environment and substantially less cost to the taxpayer.

In contrast, the I-73 project in South Carolina has never seriously considered improving existing roadways to fulfill the stated need. As we have explained in previous letters, the assessment of the project to date has been flawed by the unreasonably narrow view that the project's purpose is "to provide an interstate" rather than to improve access in the lowest cost and least environmentally damaging way. This approach is inconsistent with the Corps' and DHEC's explicit obligations under federal and state law to permit only those projects that fulfill the stated need in the least environmentally damaging way. This error in the assessment process, combined with the unprecedented cost to the state's taxpayers and natural resources, has made this project highly controversial and stalled its development several times over the last decade.

By requesting these permits again, the applicant has now revived the project, which has been "revised to include modifications to the previously advertised work and the proposed compensatory mitigation plan" referred to as the Gunter's Island site. The JPN does not identify or explain the "modifications to the previously advertised work," and does not include any documents or information about the new proposed mitigation plan involving Gunter's Island. We later received some information about the Gunter's Island plan through a Freedom of Information Act request.

COMMENTS

I. The Corps and DHEC should urge the applicant to withdraw its requests for permits until the applicant reevaluates and supplements the FEIS.

NEPA and applicable regulations require the applicant to reevaluate and supplement the FEIS. Both the Corps and DHEC typically rely on the NEPA documents prepared by the applicants, such as this FEIS, to inform their own assessments required by federal and state law, including the Corps' own obligation to comply with NEPA. Moreover, the public and numerous other interested agencies rely on the NEPA documents to provide comments on both the project and the federal and state permitting processes. Because NEPA and relevant regulations require the applicant to reassess the project, the Corps and DHEC encourage the applicant to withdraw its request for permits until the applicant complies and supplements the FEIS.

Federal Highway Administration regulations require "[a] written evaluation of the final EIS ... if major steps to advance the action ... have not occurred within three years after the approval of the final EIS, final EIS supplement, or the last major Administration approval or grant." 23 C.F.R. § 771.129(b). The reevaluation must occur "before further approvals may be granted." *Id.* The purpose of the reevaluation is to determine whether the applicant must supplement the FEIS. *See* 23 C.F.R. § 771.129(a). The FEIS "shall be supplemented" where there are "[c]hanges to the proposed action" or "[n]ew information or circumstances" that are

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the existing roadways. . . . North Carolina has also completed portions of I-73 by the re-designation of existing roads as an interstate facility.").

"not evaluated in the" FEIS. 23 C.F.R. § 771.130(a)(1), (2). Where reevaluation is required, "[t]he entire project should be revisited to assess any changes that have occurred and their effect on the adequacy of the final EIS."[5]

More broadly, NEPA itself requires the applicant to supplement the FEIS where there has been a significant change in circumstances. The Supreme Court has explained that, while "supplemental environmental impact statements [are] not expressly addressed in NEPA," they are "at times necessary to satisfy the Act's 'action-forcing' purpose." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 370-71 (1989). The Fourth Circuit has made clear that an agency must supplement an FEIS "when a project changes or when new information comes to light.'" *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 190 (4th Cir. 1999) (citing *Marsh* 490 U.S. at 374). If the change or new information "presents a seriously different picture of the environmental impact of the proposed project from what was previously envisioned," then "the FEIS must be supplemented." *Id.* (quoting *Hickory Neighborhood Defense League v. Skinner*, 893 F.2d 58, 63 (4th Cir. 1990) and 23 C.F.R. § 771.130).

Either way you look at it, SCDOT must reevaluate and supplement the FEIS. The FEIS was completed in 2007 – almost a decade ago – and although the applicant reevaluated the FEIS in 2010, the applicant decided not to supplement it. As a result, the major environmental assessments of this project have not been updated since 2007. The circumstances today present a "seriously different picture" than the project as first proposed in 2004 and finally assessed in 2007 (and 2008, for the Northern Corridor).

For example, the JPN mentions changes to the project design and notes that an entirely different mitigation plan has been proposed, significantly altering the environmental costs and benefits of the project as compared to the non-revised version originally assessed in the FEIS. Moreover, crucially important facts like the $2.37 billion estimated cost of the project have undoubtedly changed since the last estimates produced by the SCDOT. In fact, we are unaware of any revised cost estimate since the FEIS for the Southern Corridor was published. It is likely that the overall cost of the project has risen dramatically in the intervening years. The FEIS must be supplemented to reflect the current estimated cost in addition to other significant changes that have occurred since 2007, including changes in the economic development, traffic, and environmental quality contexts. In addition, the FEIS fails to consider important alternatives we have identified that would satisfy the need for the project by upgrading existing roadways.

Moreover, since the publication of the FEIS for the Southern Corridor in November 2007, the nation, as you know, experienced a significant recession between 2007 and 2009 that was brought about by a collapse of the housing market. The FEIS appears to rely on data that preceded the recession. As such, it is important to supplement the FEIS for both corridors to ensure that the projections, including population growth and traffic projections, are reflective of current conditions. Agencies have a duty to "insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements." 40 C.F.R. § 1502.24. Reliance on outdated traffic forecasts fails to "satisfy the requirements of

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[5] U.S. Dep't of Transp., *Guidance for Preparing and Processing Environmental and Section 4(F) Documents*, (1987) https://www.environment.fhwa.dot.gov/projdev/impta6640.asp#reev at XI.B.

NEPA," and the DSFEIS "cannot provide the basis for an informed evaluation or a reasoned decision." *Sierra Club v. US Army Corps of Eng'rs*, 701 F.2d 1011, 1030 (2d Cir. 1983).[6]

In sum, the revised project in 2016 presents a "seriously different picture" than the non-revised project evaluated 2007.[7] Thus, "the FEIS must be supplemented." *Jersey Heights*, 174 F.3d at 190.[8]

Generally, the Corps and DHEC rely on EIS's prepared for projects such as this to conduct their own legally-required reviews, and the public relies on such documents to engage with the permitting process. As we explain below, the agencies cannot issue permits to the project as proposed, both because information supporting the proposed project is outdated and insufficient and because less damaging practicable alternatives to the project as proposed exist. However, it appears that the Corps and DHEC also cannot simply wait until the applicant supplements the FEIS because federal law requires the Corps to issue these permits within 180 days after the date of the permit application. *See* 23 U.S.C. § 139(g)(3). As a result, we recommend that the Corps and DHEC urge the applicant to withdraw their permit application until the applicant has properly supplemented the FEIS to reflect the true costs of the project and adequately considered alternatives.

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[6] A long line of federal courts have held that agency reliance on data that is stale or inaccurate invalidates environmental review. *See, e.g., Northern Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085-86 (9th Cir. 2011) (ten-year old survey data for wildlife "too stale" thus reliance on it in EIS was arbitrary and capricious); *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (six year-old survey data for cutthroat trout was "too outdated to carry the weight assigned to it" and reliance on that data violated NEPA); *Seattle Audubon Soc. v. Espy*, 998 F.2d 699, 704-05 (9th Cir. 1993) (reliance on "stale scientific evidence" regarding owl population data without adequate discussion of scientific uncertainty violated NEPA). Courts have been clear that the quality of data must be proportional to the weight the agency assigns to it in its analysis. Here, the accuracy of the data relating to population and traffic underlies both the purpose and need for the project and alternatives.

[7] This circumstance does not meet any of the exceptions that change the applicant's basic obligation to reevaluate and supplement. The regulations explain that a "supplemental EIS will not be necessary" where the changes to a project, new information, or new circumstances are beneficial to the environment, or when – because of the new information – the Corps selects an alternative that has already been evaluated by the FEIS. Here, one of the main problems with the FEIS is that it fails to adequately assess the changes in environmental and taxpayer costs of the project as now proposed, and fails to assess data supporting viable alternatives upgrading existing roads, which appear to be the least damaging practicable alternatives. These circumstances do not satisfy the exceptions to reevaluating and supplementing the FEIS.

[8] Important regulatory changes have occurred since publication of the FEIS, which weigh in favor of supplementation. For example, on August 1, 2016, the Council on Environmental Quality issued Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews. This guidance states that it should apply to all new proposed agency actions when a NEPA review is initiated. In light of the need to supplement the FEIS here, SCDOT and FHWA should use this guidance in the development of a supplemental EIS to consider how climate change, including sea level rise and increased storm activity, could affect the proposed highway proposal, including traffic projections in the region.

II. The agencies cannot issue permits to the project as proposed.

As you know, we have submitted previous letters on the I-73 proposal to both the Corps and DHEC. We do not wish to repeat all of our concerns here, so we are including our previous letters and exhibits with this submission. Nevertheless, there are a couple of key points that bear repeating at this point in the process. Regardless of what steps SCDOT decides to take with respect to supplementing the FEIS, it is critically important that the Corps exercise its own independent judgment in defining the purpose and need for this project. By failing to do so, the Corps risks undermining its entire analysis under the Section 404(b)(1) Guidelines.

Pursuant to the Clean Water Act, the Corps must deny a Section 404 permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). In our previous comments, we explained that the evaluation process for I-73 in South Carolina has been artificially constrained to prohibit meaningful consideration of alternatives that would consist largely of upgrading already existing roadways, such as S.C. 38 and U.S. 501. The Corps must not allow its own analysis under the Clean Water Act to be shortchanged by relying on an outdated FEIS with an unreasonably constrained view of the project's purpose.

As explained more fully below, the Corps and DHEC (in addition to other relevant agencies and the public) would be in a far better position if they would wait until the FEIS is supplemented, as the law requires, before proceeding further. If SCDOT fails to supplement the FEIS, then the Corps has the authority to require SCDOT to provide the additional information needed for "an informed, considered analysis of the environmental impact" of project alternatives." *Lakewood Assocs. v. United States*, 45 Fed. Cl. 320, 332-33 (Ct. Cl. 1999). However, if the Corps and DHEC move forward based on the project as proposed in the JPN, the agencies must deny the requested permits either because there is not sufficient data supporting the proposed alternative, or because least damaging practicable alternatives to the proposed project exist.

A. The JPN's statement of purpose and need remains flawed.

It is important to reiterate our concerns that the Corps adopt a proper statement of purpose and need. As we have explained previously, to implement the Guidelines properly and identify the least environmentally damaging practicable alternative, the Corps must begin by setting forth a correct statement of a project's "basic purpose." *See* 40 C.F.R. § 230.10(a)(3); 33 C.F.R. Part 325, App. B(9)(b)(4). The Corps has explained that: "It is only when the 'basic project purpose' is reasonably defined that the alternatives analysis required by the [404(b)(1)] Guidelines can be usefully undertaken by the applicant and evaluated by the Corps."[9] Courts have agreed that determining the project's purpose is "central" to the Corps' analysis, as it dictates both the range of practicable alternatives and the applicant's burden of proof. *See, e.g., Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1345 (8th Cir. 1994).

[9] U.S. Army Corps of Engineers, Permit Elevation, Old Cutler Bay Associates, at 6 (Sept. 30, 1990).

Although the Corps must take the applicant's goals and purposes into account, *Louisiana Wildlife Fed'n v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985), it is not bound by the applicant's stated purpose. Rather, the Corps' regulations require that "the Corps will, in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective." 33 C.F.R. § 325, App. B(9)(b)(4). Exercise of the Corps' independent judgment ensures "an applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable." *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 409 (9th Cir. 1989).

The statement of purpose in the JPN shirks this responsibility by repeating the applicant's unreasonably narrow approach. The JPN describes the overall project purpose as follows: "According to the application, the project purpose is to provide an interstate link between the I-73/I-74 Corridor in North Carolina to the Myrtle Beach region in South Carolina." JPN at 2. This stated project purpose – to build an interstate – essentially mandates a specific project design rather than consider viable alternatives that use and upgrade existing roads to satisfy the needs of the project. This is, as mentioned above, an attempt to "define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable." *Sylvester*, 882 F.2d at 409.

As we have explained through numerous letters and expert reports, there are alternative designs that use and upgrade existing roads to fulfill the stated needs for this project with far less environmental impact and at much lower cost. The JPN goes on to identify needs like "system linkage," "economic development," and "multimodal planning," as well as "secondary needs," like tourism access and improved safety on existing roads for the Northern portion, and facilitating hurricane evacuation from the coast and relieving local traffic congestion for the Southern portion. JPN at 2-3. None of these needs require an interstate, and alternatives that use and upgrade existing roads offer the least damaging practicable method of achieving those goals.

The purpose and need for the project cannot lawfully be defined in a way that mandates a new alignment corridor and precludes the consideration of upgrading an existing highway corridor. The Corps guards against this problem by using its own judgment to identify the project's purpose in a way that ensures consideration of a reasonable range of alternatives and the eventual identification of the least damaging practicable alternative. To do so, it is essential that the project purpose be stated neutrally and without an artificial level of specificity. Accordingly, we respectfully suggested in previous comments that the basic purpose of the project could be properly articulated as follows: "To provide increased highway capacity to serve residents, businesses and tourists traveling between I-95 and the Myrtle Beach area in a fiscally realistic and environmentally responsible fashion." Without repeating them here, we made even more specific recommendations regarding the purpose and need statement in our comments to the Corps and DHEC dated March 28, 2011. In order for the Corps to undertake a defensible evaluation of I-73 under the 404(b)(1) Guidelines, it is imperative that the Corps start by adopting a reasonable statement of purpose and need that will allow for the consideration of a sensible range of alternatives, regardless of the statement of purpose and need of SCDOT in the FEIS.

B. The proposed project does not satisfy the requirements of the Section 404(b)(1) Guidelines.

The Clean Water Act requires the Corps to comply with the Section 404(b)(1) Guidelines before issuing the requested permits. The Guidelines specifically prohibit the Corps from issuing a permit where:

> (i) There is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem …; or
>
> (ii) The proposed discharge will result in significant degradation of the aquatic ecosystem …; or
>
> (iii) The proposed discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem; or
>
> (iv) There does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines.

40 C.F.R. § 230.12(a)(3). These requirements translate into a three-step reasoning process that reflects a strict alternatives analysis. The steps are to first avoid damage to wetlands, second minimize unavoidable damage to wetlands, and third – only if damage to wetlands is both unavoidable and unminimizable – allow compensatory mitigation.[10] So long as there is a less damaging, practicable alternative to the project as proposed, the Corps may not consider proposals to minimize or compensate for damage to wetlands. The permit must be denied.[11]

Where – as here – the proposed project is not "water dependent," the Guidelines make this process even more rigorous by stating that less damaging practicable alternatives "are presumed to be available, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3). As courts have explained, "the test is not whether a proposed project is 'better' than an alternative with less wetlands impact because it would cost less and have less impact on existing and future development. The test is whether the alternative with less wetlands impact is 'impracticable,' and the burden is on the Applicant [SC]DOT, with independent verification by the [Corps], to provide detailed, clear and convincing information proving impracticability." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1186 (10th Cir. 2002).

The applicant, therefore, faces a heavy burden to prove to the Corps by clear and convincing evidence that there is no other viable alternative that will have less impact on wetlands. As we have explained in previous letters, the applicant's proposed route does not satisfy this requirement. It is also important to note that South Carolina's Section 401 regulations contain a similar standard, prohibiting certification if "there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses." S.C. Code Ann. Regs. § 61-101(F)(5)(b).

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[10] Memoranda of Agreement (MOA), 55 Fed. Reg. 9210-01 (Mar. 12, 1990).
[11] *See* MOA.

As we have explained above, the analysis in the FEIS is unreasonably constrained by an assumption that the purpose of the project is to "to build an interstate" rather than fulfill the stated need. As a result, the FEIS fails to consider an entire set of alternatives that upgrade existing roads to satisfy the need for the project, as states like Ohio, Michigan, and North Carolina have done.

We have previously submitted to the Corps – and include again with these comments – three expert reports and other materials demonstrating several less damaging practicable alternatives for the southern portion of the project.[12] These reports include:

1) "The Grand Strand Expressway: An Alternative to the Proposed I-73 to the Myrtle Beach Area," prepared by the transportation consulting firm Smart Mobility, Inc.;

2) "Aerial Photographic Analysis Comparing Aquatic Impacts of S.C. 38/U.S. 501 Upgrade with Proposed I-73," which was prepared by Donley E. Kisner (Aerial Photographic Analysis); and

3) The "Economic Analysis of I-73 and the Grand Strand Expressway Alternative," which was prepared by Miley & Associates (Miley Report).

These reports demonstrate that the number of wetland acres that would be impacted by upgrading the existing S.C. 38/U.S. 501 corridor between I-95 and the Conway Bypass would be significantly less than the amount of wetlands that would be impacted by I-73. According to the SCDOT, the construction of I-73 between I-95 and the Conway Bypass would impact 313 acres of wetlands whereas upgrading the existing corridor would impact approximately 119 acres of wetlands based on a three-hundred-foot wide footprint and approximately 50 acres of wetlands based on a two-hundred-foot wide footprint.[13]

Similarly, the construction of this same segment of I-73 would include 22 stream crossings totaling 3,860 linear feet of stream disturbance. Conversely, the number of new stream crossings that would be impacted by the construction of the GSX is zero.[14]

In addition to involving far fewer aquatic impacts, the Grand Strand Expressway upgrade alternative is clearly practicable. *See* 40 C.F.R. § 230.10(a)(2) (stating an alternative to discharge to a wetland "is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes").

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[12] To be clear, the applicant has requested permits for both portions of I-73, and both the Northern and Southern portions suffer from the same flaws – namely, the lack of proper environmental assessment and consideration of alternatives. While we illustrate these problems by primarily discussing the Southern Corridor, our comments apply to the Northern Corridor as well. The applicant must reevaluate and supplement the FEIS regarding the Northern portion as well, and the Corps cannot permit the Northern portion as proposed because less damaging practicable alternatives exist, as discussed in previous letters and expert documents attached to those letters.

[13] Aerial Photographic Analysis at 3.

[14] Aerial Photographic Analysis at 3-4.

According to the Miley Report, the GSX alternative "offers substantial economic benefits at *one-tenth of I-73's estimated $1.3 billion cost* and would result in improved access to the Myrtle Beach tourism market."[15] The Miley Report also explains that economic benefits from the upgrade alternative would be realized sooner than with the proposed I-73, would create thousands of jobs, and would save businesses along the existing routes. The report also confirms that the other identified purposes that have been advanced for the I-73 proposal, such as mobility, would also be met through an upgrade option. Moreover, it is the new location interstate that is the most *impractical* of all alternatives before the Corps. I-73 is simply not realistic from a fiscal perspective, especially in light of the fact that the estimated cost of I-73 has not been updated in years.

By law, the Corps must not only consider but require SCDOT to submit clear and convincing evidence disproving practicable alternatives, such as the Grand Strand Expressway. Importantly, the inadequacy of the FEIS does not excuse the Corps from its independent obligation to analyze and select the less-damaging alternatives to the project as proposed in the JPN, which the CWA and its implementing regulations presume are available. According to the 404(b)(1) Guidelines, "the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines." 40 C.F.R. § 230.10(a)(4). But, where the NEPA documents "may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines[,]" "it may be necessary to supplement these NEPA documents with this additional information." *Id.* Accordingly, where the existing NEPA documents do not contain sufficient information, the Corps has the authority to require SCDOT to provide the additional information needed for "an informed, considered analysis of the environmental impact" of project alternatives. *Lakewood Assocs. v. United States*, 45 Fed. Cl. 320, 332-33 (Ct. Cl. 1999).

As explained above, given the amount of time that has passed since the publication of the FEIS and the Corps' timeline for making a decision on this permit, we believe that the most constructive way forward is for the applicant to withdraw its permit request so that the FEIS can be supplemented. Should the Corps and DHEC move forward with the permitting process, the agencies must deny the permits either because there is not enough data to support the proposed project, or because there are less damaging practicable alternatives to the project as proposed, including the Grand Strand Expressway.

III. Additional information is needed to assess the mitigation plan.

As an initial matter, the applicant has not demonstrated that mitigation is appropriate because there are less damaging practicable alternatives to the project as proposed. The Guidelines make clear that the Corps must undergo a strict process that will only consider mitigation once the applicant has proved by clear and convincing evidence that there is no less damaging practicable alternative. The applicant has not made that showing. *See* Part II.B.

In addition, the JPN did not include any information about the proposed Gunter's Island compensatory mitigation plan. This itself is a concern, as the mitigation plan should be easily

[15] Miley Report at 2 (emphasis added).

accessible to the public for review and comment. We request that the Corps make the mitigation plan accessible to the public at large by putting it on the Corps' website or by other means.

Putting these issues aside, we received some information about the plan in response to a Freedom of Information Act request, but substantially more information is needed to determine whether this mitigation plan complies with federal regulations. Overall, the mitigation plan cannot be fully evaluated since details of the plan have not been provided, and there is no mitigation work plan, which might address some of the concerns regarding inadequacy of information, including baseline information, maintenance plans, performance standards, monitoring requirements, and long-term management of the site. Below are our specific comments on the I-73 Compensatory Mitigation Plan (the Mitigation Plan), which is dated June 20, 2016 and was provided to us in response to a FOIA request to the Corps:

Section 4.0: Proposed Compensatory Mitigation Plan

The Mitigation Plan states: "The components of a complete mitigation plan are identified in the Mitigation Rule (33 C.F.R. 332.4(c)). The following sections provide additional guidance about the information that will be required to review and approve a PRM plan." Mitigation Plan at 12.

It is unclear to us from the plan itself and this language whether this document is intended to be the final mitigation plan rule. Several elements of a mitigation plan are lacking sufficient detail in the current document to provide constructive comments as to the ability of the mitigation site to meet the objective of offsetting wetland and stream impacts from I-73. *See* Mitigation Rule (33 C.F.R. Parts 325 and 332, 40 C.F.R. Part 230) at 332.4(c) (proving requirements for the final mitigation plan and saying that "the level of detail of the mitigation plan should be commensurate with the scale and scope of the impacts").

Section 4.1: Goals and Objectives

The proposed mitigation plan states that: "The purpose of this mitigation plan is to provide compensatory mitigation for the impact of 4,643 linear feet of stream and 342.3 acres of wetlands with the development of I-73. Mitigation will be accomplished by preserving the entirety of Gunter's Island, 6,134 acres, with 89,836 linear feet of stream preservation and/or enhancement and 4,583.1 acres of wetland preservation." Mitigation Plan at 12.

The level of detail in the mitigation plan is not commensurate with the scale and scope of the impacts. Additional details regarding the mitigation resources are needed. The 89,836 linear feet of stream preservation and/or enhancement is misleading since only one side of the Little Pee Dee River (58,080 feet) will be protected while both sides of Evans Branch (18,467 feet) and UT to Little Pee Dee (13,289 feet) will be protected. Also, the 4,583.1 acres of wetland preservation appears to be based on the National Wetland Inventory (NWI). NWI data is not sufficient for determining the extent of jurisdictional wetlands for a mitigation plan. A wetland delineation of the entire tract should be completed to determine the exact acres of jurisdictional wetlands. *See* 332.4(c)(5) (saying "[t]he baseline information should also include a delineation of waters of the United States on the proposed compensatory mitigation project site"). In addition, the plan describes potential wetland enhancement activities, but it is not clear from our review whether enhancement will be part of the final plan.

Section 4.4: Baseline Information and Conditions

There is not enough detail in this section regarding the natural resources of the mitigation site, and there appears to be no wetland delineation of the site. Accordingly, there is not enough information to determine that the mitigation site is sufficient to offset impacts associated with the I-73 proposal. *See* 33 C.F.R. § 332.4(c)(7) (providing detailed requirements and specifications for mitigation work plans).

Section 4.5: Mitigation Work Plan

The mitigation plan states: "Upon issuance of the relevant state and federal permits and authorizations to construct I-73 and prior to the start of any construction, SCDOT will continue to coordinate with SCDNR to get the site incorporated into the Heritage Trust Program as a 'Heritage Preserve.' A fee simple title transfer is anticipated as well as a 'Long-Term Site Protection Agreement.'" Mitigation Plan at 26.

In order to allow for meaningful public review, a copy of the Site Protection Agreement for Gunter's Island should be available for review.

Section 4.5 also states that: "Following dedication of the property, SCDNR will have one year to complete baseline data assessments of the property for development of a work plan." Mitigation Plan at 26.

It appears there is a schedule for data collection but no deadline for the mitigation work plan. Baseline data should be collected before impacts for I-73 are authorized. Without baseline data the mitigation cannot be evaluated to determine if it appropriately offsets the project impacts.

Section 4.5.2: Stream Enhancement

The mitigation plan states that: "Approximately 150 feet of stream will be enhanced to include the replacement or removal of undersize and/or perched culverts, bridges, and/or roads that are impeding flow, and bank stabilization along reaches upstream and downstream of stream crossings." Mitigation Plan at 26-27.

There are no details about the location of stream enhancement activities or specific prescriptions for each location. There is insufficient information to assess proposed stream enhancement.

Section 4.5.4: Wetland Enhancement

The mitigation plan states that: "Potential wetland enhancement/restoration could involve the removal of pine stands and replanting with appropriate wetland species; supplemental plantings along the floodplain and banks of enhanced stream channels; and the replacement or removal of undersized and/or perched culverts, bridges, and/or roads that are impairing natural hydrology." Mitigation Plan at 27.

First, the section of the mitigation plan, which defined the plan's goals and objectives, included wetlands preservation as a goal, but but did not mention wetland enhancement. Mitigation plans must specifically state the proposed activities. Simply saying something "could" be done is inadequate.

Second, we have not had an opportunity to review a detailed plan of work, so it does not appear possible at this time to assess the potential functional uplift to be derived from potential wetland enhancement.

Section 4.6.3: Access Road Maintenance

The mitigation plan states that: "If access is required within a forested area to repair a structure, which cannot be accessed through an existing primary road or trail, a temporary access road will be installed. Approval from the USACE will be acquired prior to constructing the temporary access road within the Site." Mitigation Plan at 28-29.

No further impacts should be allowed unless related directly to stabilizing an outfall. Access should be accomplished from an existing road, and no new access should be granted. From the documents provided, it is not clear why other access would be required nor is it clear why it would not be possible to replace culverts from the existing road.

Section 4.6.5: Supplemental Plantings

The Mitigation Plan states: "Potential maintenance measures may include supplemental replanting along wetland and stream buffers affected by enhancement or restoration activities. If the planting areas do not meet the vegetation performance standards during the annual monitoring, the reason for the plant mortality will be identified and supplemental plantings may be added to the density specifications of the reference areas." Mitigation Plan at 29.

From the materials we have reviewed, it is not clear what the "performance standards" referred to are. Also, there are no "reference areas" identified in the mitigation plan. *See* 33 C.F.R. § 332.4(c)(9) ("Performance standards. Ecologically-based standards that will be used to determine whether the compensatory mitigation project is achieving its objectives").

Section 4.7: Performance Standards

The mitigation plan states: "These standards will be developed as a part of the developed work plan submitted to the Corp for review and approval one year following dedication of the property as a Heritage Preserve." Mitigation Plan at 29.

A detailed work plan should be a part of this proposed mitigation plan and should be made available for public review and comment. *See* 33 C.F.R. § 332.4(c)(10) (saying "[a] description of parameters to be monitored in order to determine if the compensatory mitigation project is on track to meet performance standards and if adaptive management is needed. A schedule for monitoring and reporting on monitoring results to the district engineer must be included."

Section 4.8: Monitoring Requirements

The mitigation plan states: "Specific monitoring requirements for restoration or enhancement activities will be developed as part of the work plan submitted to the Corp for review and approval one year following dedication of the property as a Heritage Preserve." Mitigation Plan at 30.

It is not possible for us to assess the mitigation plan without a work plan that details the monitoring requirements. Monitoring requirements and performance standards are required to determine if the mitigation is meeting its objectives to properly offset project impacts. *See* 33 C.F.R. § 332.4(c)(11) (saying "[a] description of how the compensatory mitigation project will be managed after performance standards have been achieved to ensure the long-term sustainability of the resource, including long-term financing mechanisms and the party responsible for long-term management").

Section 4.9: Long Term Management

The mitigation plan states: "Once performance standards have been met, no additional maintenance of proposed restoration or enhancement areas are anticipated. These areas will be protected in perpetuity as part of the approved USACE work plan, the Long Term Site Protection Agreement with USACE and DHEC and the Heritage Trust Program. Long-term management of Gunter's Island will be conducted, as determined necessary and appropriate, by SCDNR as the long-term steward under the Heritage Trust Program." Mitigation Program at 30.

We have not had an opportunity to review a mitigation work plan with long-term management details. Mitigation sites should have a long-term management plan to ensure the mitigation site is functioning.

Adaptive Management

There is no significant discussion of adaptive management plan in the mitigation plan. *See* 33 C.F.R. § 332.4(c)(12) (providing for "[a] management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing adaptive management measures").

Section 4.9.4: Funding Mechanism

The mitigation plan states: "Any management activities following completion of the monitoring period and closure of the Site as specified in this mitigation plan will be funded through monetary appropriations by SCDNR and the Heritage Trust Program." Mitigation Plan at 32.

A source and level of funding must be determined prior to issuing the permit for I-73. Maintenance and protection of Gunter's Island is perpetual, therefore a non-wasting endowment to perform annual maintenance activities should be provided. *See* 33 C.F.R. § 332.4(c)(13).

Appendix C: HGM Mitigation Properties Agreements

There appears to be some inconsistency in Sections C and D of the HGM Agreement, which is included to illustrate how Gunter's Island would be managed. Section C of Prohibited Uses outlines numerous activities that are not allowed in a heritage preserve site including "no destruction of animal life;" no "cutting" of trees or "removal of natural materials;" "no draining, dredging, damming, impounding[,] … [or] discharge or activity requiring a permit under applicable clean water or water pollution control laws;" no "industrial," "commercial," or "commercial agricultural activities" allowed; and "no application of biocides and/or biological controls" as related to control of non-native and/or invasive species. HGM Agreement at 4-5. The listed prohibited use would imply no active management or any type of use except for non-consumptive use.

Section D of reserved rights allows for timber harvest, use of agrichemicals, and hunting and fishing recreation. HGM Agreement at 6. We request additional information regarding plans for timber harvesting of the proposed mitigation site.

In sum, until the applicant establishes compliance with avoidance and minimization requirements, it is premature to evaluate the proposed mitigation plan. Moreover, the proposed plan we have reviewed does not contain sufficient information to provide for meaningful review at this time. The Corps may use compensatory mitigation only where "[t]he resources to be preserved provide important physical chemical, or biological functions" and "contribute significantly to the ecological sustainability of the watershed" as established by "appropriate quantitative assessment tools." 33 C.F.R. § 332.3(h)(1). The Corps must "clearly state[]" in either the mitigation plan or in enforceable permit conditions "the amount and type of compensatory mitigation," "the objectives, performance standards, and monitoring required for the compensatory mitigation project," and "any required financial assurances or long-term management provisions for the compensatory mitigation project." 33 C.F.R. § 332.3(k).

Without additional information, we cannot assess the viability of the proposed mitigation plan, and – more importantly – the Corps cannot issue permits relying on this mitigation plan. 40 C.F.R. 230.94 (c)(1)(i) (the Corps must approve a final mitigation plan including the necessary information "prior to issuing the individual permit.").

IV. The Corps cannot ignore previously submitted comments about I-73.

Despite the decade-long public engagement process and detailed administrative record, the Corps states that "only comments received in response to this public notice" – meaning this 2016 notice – "will be considered." It is unreasonable for the Corps to only consider comments submitted in response to this 2016 JPN, rather than the voluminous public comments and administrative record developed over many years. For the Corps' convenience, we attach and incorporate by reference our previous comments regarding I-73 and their attachments.

Nevertheless, if judicial review of the Corps' decision is necessary at some point in the future, such review will be based on "everything that was before the agency pertaining to the merits of its decision," which will be the entire record regarding this project. *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993); *see also Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Plaintiffs may supplement the record on review to include that was before the agency but ignored or otherwise withheld from the record of its decision for purposes of litigation. *See Portland Audubon*, 984 F.2d at 1548 ("Indeed, where the so-called 'record' looks complete on its face and appears to support the decision of the agency but there is a subsequent showing of impropriety in the process, that impropriety creates an appearance of irregularity which the agency must then show to be harmless."). We recommend that the Corps make its decision in light of the whole record, rather than just the comments submitted in response to this JPN.

Thank you for the opportunity to submit these comments. Please do not hesitate to contact us if you would like to discuss our comments in greater detail.

Sincerely,

Christopher K. DeScherer

Enclosures

cc (without enclosures):

Kelly Laycock, EPA
Emily O. Lawton, FHWA
Pace Wilber, NMFS
Mark Caldwell, USFWS
Ron Patton, SCDOT
Bob Perry, SCDNR
Blair Williams, OCRM
Nancy Cave, Coastal Conservation League
Natalie Olson, Coastal Conservation League